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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1030

STATE OF MINNESOTA, by its Attorney General WARREN SPANNAUS, and its POLLUTION CONTROL AGENCY,

Appellant,

vs.

MARTIN R. HOFFMAN, Secretary, DEPARTMENT OF THE ARMY, et al.,

Appellees.

ON APPEAL FROM, AND PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Amicus Curiae Brief of the States of California, Hawaii, Idaho and Washington

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In the Supreme Court of the United States

October Term, 1976

No. 76-1030

State of Minnesota, by its Attorney General Warren Spannaus, and its Pollution Control Agency,

Appellant,

vs.

Martin R. Hoffman, Secretary, Department of the Army, et al.,

Appellees.

ON APPEAL FROM, AND PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Amicus Curiae Brief of the States of California, Hawaii, Idaho and Washington

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1254(2) the State of Minnesota, acting by and through its Attorney General, has appealed to this Honorable Court from a judgment of the United States Court of Appeals for the Eighth Circuit. This amicus curiae brief is respectfully submitted by the State of California, pursuant to Rule 42 (4), joined in by the States of Hawaii, Idaho and Washington.

INTEREST OF THE AMICI STATES

The decision of the Court of Appeals, *State of Minnesota v. Hoffman,* 543 F. 2d 1198 (1976), held that the United States Army Corps of Engineers was not required to meet state water pollution standards in its conduct of dredging operations in navigable waters within Minnesota. As the Court of Appeals properly recognized, the case is one of first impression; as such, its precedential impact will extend far beyond the immediate impact on Minnesota's water quality.

California, for example, faces on the waters of the Pacific Ocean for more than 1,000 miles. Its bays, harbors and wetlands are often the subject of Corps of Engineers dredging activities. In the San Francisco Bay system alone, the Corps operates for a substantial part of each year. Thus, the impact of the Court of Appeals' decision may have a significant impact on California's attempt to maintain adequate water quality in all areas of the State.

The States of Washington and Hawaii also have jurisdiction over extensive water areas in which the Corps of Engineers operates; each state will accordingly be affected substantially by a final conclusion that dredging by the Corps is not subject to state water quality standards. Finally, the State of Idaho is affected by several projects undertaken by the Corps, and thus has a similar interest in the question raised here.

Each of the amici states, as we shall note below, believes that the Eighth Circuit decision misconceives the congressional intent underlying the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U. S. C. §§ 1251 et seq. (Supp. IV). In light of the guidance provided by this Court in *Environmental Protection Agency*

v. California ex rel. State Water Resources Control Board, 426 U. S. 200 (1976), it should be concluded that the congressional requirement of Corps' compliance with state substantive water quality standards is sufficiently "clear and unambiguous" to sustain, in part, the judgment of the District Court.* The Court should accordingly note probable jurisdiction, and the judgment of the Court of Appeals should be reversed.

I. THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 REQUIRE COMPLIANCE BY ALL FEDERAL AGENCIES WITH STATE SUBSTANTIVE WATER QUALITY STANDARDS UNLESS EXEMPTED BY PRESIDENTIAL ORDER.

I.

As pertinent here, section 313 of the Act, 33 U. S. C. § 1323 (Supp. IV), specifies:

> "Each department, agency or instrumentality of the executive, legislative and judicial branches of the federal government . . . shall comply with federal, state, interstate, and local requirements respecting control and abatement of pollution. . . ."

This waiver of federal immunity from the burdens imposed by state regulation could hardly be clearer. Undoubtedly for that reason, the federal government has conceded that federal agencies, departments and instrumentalities "must comply with the applicable effluent limitations and compliance schedules promulgated by the particular state pur-

*In light of *Environmental Protection Agency v. California ex rel. State Water Resources Control Board, supra,* we do not disagree with the Court of Appeals' conclusion that the Corps is not subject to either Minnesota's permit requirement established under the NPDES permit system of the Federal Water Pollution Control Act Amendments, 33 U.S.C. § 1342 (Supp. IV), or its permit requirement established under independent state law.

suant to its E. P. A.-approved implementation plan." Brief for the Petitioner, p. 18, in *Environmental Protection Agency v. California ex rel. State Water Resources Control Board, supra,* 426 U. S. 200 (1976). The federal government has also similarly conceded that "it must meet all substantive water pollution standards set by the state." Petition for Certiorari, p. 6, in *Environmental Protection Agency v. California ex rel. State Water Resources Control Board, supra.* Based in part on these representations, the Court has concluded that " 'the "requirements" language of Section 313 refers simply and solely to substantive' standards, to effluent limitations and standards and schedules of compliance." *Id.* at p. 215.

Without reference to any other provision of the Act, section 313 would accordingly require compliance by the Corps of Engineers with the pertinent Minnesota water quality standards; in the words of the District Court, section 313 is "an unqualified order to comply." *Minnesota v. Callaway,* 401 F. Supp. 524, 530 (D. Minn. 1975). The Court of Appeals nonetheless reached a contrary conclusion based on the existence of section 404 of the Act, 33 U. S. C. § 1344, which creates a separate permit program administered by the Corps of Engineers for dredging and filling in the nation's waters. In significant part, the Court of Appeals relied upon various congressional history indicating that the Corps plays an important role in maintaining the waterways of the nation open to water-borne traffic.

Section 404, however, contains no indication whatsoever of congressional intent on the question of Corps of Engineers compliance with state water quality standards: the section does no more than establish a permit program separate from the National Pollutant Discharge Elimination

System permit program administered by the Environmental Protection Agency under section 402, 33 U. S. C. § 1342 (Supp. IV).

The significance of the role of the Corps of Engineers in maintaining the waterways of the nation likewise does not answer the question raised. No doubt other federal agencies can cogently argue the significance of their congressionally authorized role in furthering commerce among the states; their obligation with respect to compliance with state water quality standards is, however, explicitly declared by section 313. It cannot be assumed that Congress intended to exempt a single federal agency from such a sweeping declaration, especially when the evidence relied upon does not even speak to the precise question.

The Court of Appeals found an "overriding concern" of Congress "for the maintenance of unimpeded traffic in the navigable waters of the United States" and concluded that the application of varying state laws "could result in a conceivably chaotic situation as riverborne traffic moved from the boundaries of one state to those of another." 543 F. 2d at p. 1209. The concern is illusory, since the question is not the applicability of state laws to traffic moving between the states; in such a situation, Congress acted to provide an *explicit* exemption from the broad power of the states to regulate. 33 U. S. C. § 1322 (f). The question here is the applicability of state laws to dredging and disposal activities performed wholly within the boundaries of the state. The pertinent Minnesota water quality standards were adopted by the state under section 303 of the Act, 33 U. S. C. § 1313, were subsequently approved by the Environmental Protection Agency, and, as such, form a

significant part of the state water quality regulatory scheme explicitly envisioned and authorized by Congress.

The concern expressed by the Court of Appeals, moreover, was directly addressed by Congress in its adoption of section 313. Congress, aware of the danger of impairing federal functions of national interest, did not avoid the problem by completely preventing the states from exercising control over federal activities, but directly answered it by building a safeguard into the Act which could limit the extent of such control. Section 313 authorizes the President to exempt any effluent source of a federal agency from state, local or federal standards, if such an exemption would be in the "paramount interest" of the United States. This provision thus provides a specific means to allay any fear that a state may unduly impair the performance of a vital federal function.

CONCLUSION

The federal government has conceded, and this Court has properly concluded, that federal agencies must comply with substantive state water quality standards. There is no basis for the conclusion that the Corps of Engineers, simply because it operates under an independent permit system, is exempt from the obligation imposed on all other federal agencies. The concerns expressed by the Court of Appeals relating to the need for proper maintenance of the nation's waterways were specifically addressed by Congress in section 313 of the 1972 Federal Water Pollution Control Act Amendments; Congress did not provide for a complete exemption for the Corps of Engineers, but provided for a Presidential exemption only in cases where such an exemption would be in the "paramount interest" of the United States.

The states of California, Hawaii, Idaho and Washington accordingly join with Minnesota in urging that the Court note probable jurisdiction, and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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